
**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**GOLDEN STATE BOTTLING COMPANY, INC. d/b/a
PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,
RESPONDENT**

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD IN SUPPORT OF ITS PETITION FOR
REHEARING**

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1. On December 23, 1965, the Board filed its petition for rehearing requesting the Court to remand this case to the Board on the lockout issue, to allow the Board to consider the impact of the Supreme Court's decision in *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300.¹ On January 7, 1966, this

¹ In its decision of December 2, 1965, the Court sustained the Board's findings that the Company unlawfully discharged employee Baker, and unlawfully dominated the administration of the independent union (P.C.B.C.E.). The Court, however, set aside the Board's finding that the Company violated the Act by locking out its employees in order to force them to accept its contract terms.

Court issued an order denying the petition, but this order was vacated on April 5, 1966, with leave to file briefs.

As noted in the petition for rehearing, the Board's prior decision, rendered before *American Ship*, rested on the premise that a bargaining lockout was *per se* unlawful. Therefore, the Board did not deem it necessary to make a finding as to the Company's motivation for locking out the employees. In short, as this Court stated, no finding was made as to the existence of "the proscribed intent or necessary destruction of the union's capacity for responsible and effective representation" (slip op., p. 5). However, the holding in *American Ship* makes plain that, if such a finding of illegal motivation can be made, the lockout here would still be violative of the Act. We urged in our petition for rehearing that the initial determination of this question of motivation should properly be made by the Board, and that thus the case should be remanded for that purpose.

We submit that the Supreme Court's recent action in *Newspaper Drivers v. Detroit Newspaper Publishers*, 382 U.S. 374, confirms the propriety of this procedure. There, as here, the Board, prior to *American Ship*, found that a bargaining lockout was violative of the Act without regard to motivation. The Sixth Circuit, relying on *American Ship*, denied enforcement on the ground that "under the undisputed facts in this case a violation of Sections 8(a)(1) and 8(a)(3) could not be supported." *Detroit Newspaper Publishers Assn. v. N.L.R.B.*, 346 F. 2d 527, 530. The Supreme Court reversed, *per curiam*, and re-

manded the case to the Board for further consideration in the light of *American Ship*. In sum, the action of the Supreme Court in *Detroit Newspaper* shows that, in its view, the application of *American Ship* to differing lockout situations is a complex matter which should be passed on by the Board initially.² See also *N.L.R.B. v. Darlington Mfg. Co.*, 380 U.S. 263, 277; *N.L.R.B. v. Ford Motor Co.*, 305 U.S. 364, 373; *F.T.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145; *Texas Co. v. N.L.R.B.*, 120 F. 2d 186, 190-191 (C.A. 9).

2. In its original decision, the Court also denied enforcement of paragraph 1(d) of the Board's order, which required the Company to cease giving effect to the contract with the illegally assisted union, P.C.B.C.E. The Court did so because it found an apparent inconsistency between that prohibition and the proviso thereto, which read:

Provided, however, that nothing herein shall be construed to require the Respondent to vary any substantive provision of such agreement, or to prejudice the assertion by the employees of any rights they have thereunder.

We submit that the provisions are not inconsistent; their purpose is to effectuate the withdrawal of recognition from the P.C.B.C.E., for an appropriate time, without at the same time prejudicing the employees

² In *N.L.R.B. v. Tonkin Corp. of California*, No. 19714, decided November 10, 1965, another division of this Court remanded to the Board a lockout issue similar to that here. The Tenth Circuit followed the same course in *N.L.R.B. v. American Stores*, 60 LRRM 2128, September 16, 1965.

by requiring the Company to change the existing level of wages and other conditions of employment (which, though they may originally have been established by the contract, are no longer necessarily dependent on the contract). Accordingly, if, as the Court found, paragraph 1(d) is ambiguous, we submit that, instead of setting aside that paragraph, the more appropriate course would be to remand it to the Board for clarification.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's petition for rehearing should be granted, and that both the lockout and the contract questions should be remanded to the Board.

Respectfully submitted,

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April 1966

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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